Lieff Cabraser Heimann& Bernstein Attorneys at Law

Lieff Cabraser Heimann & Bernstein, LLP 250 Hudson Street, 8th Floor New York, NY 10013-1413 t 212.355.9500 f 212.355.9592

October 15, 2014

Daniel P. Chiplock Partner dchiplock@lchb.com

## VIA E-MAIL AND HAND DELIVERY

The Honorable James L. Cott 500 Pearl Street New York, NY 10007-1312

RE: In re Bank of New York Mellon Corp. Forex Litig., No. 12 MD 2335 (LAK)

Dear Judge Cott:

Customer Class Plaintiffs¹ request a conference pursuant to Local Rule 37.2² in order to resolve whether production of a document that has been improperly clawed-back and redacted by defendant The Bank of New York Mellon ("BNYM" or "the Bank") should be compelled.

On September 9, 2014, Plaintiffs submitted to Judge Kaplan, in further support of a separate discovery motion<sup>3</sup>,

in this litigation. The document was initially produced to BNYM pursuant to a non-party subpoena issued by BNYM, and then reproduced to Plaintiffs and the USAO by BNYM on March 11, 2014. It was not marked Confidential or redacted.

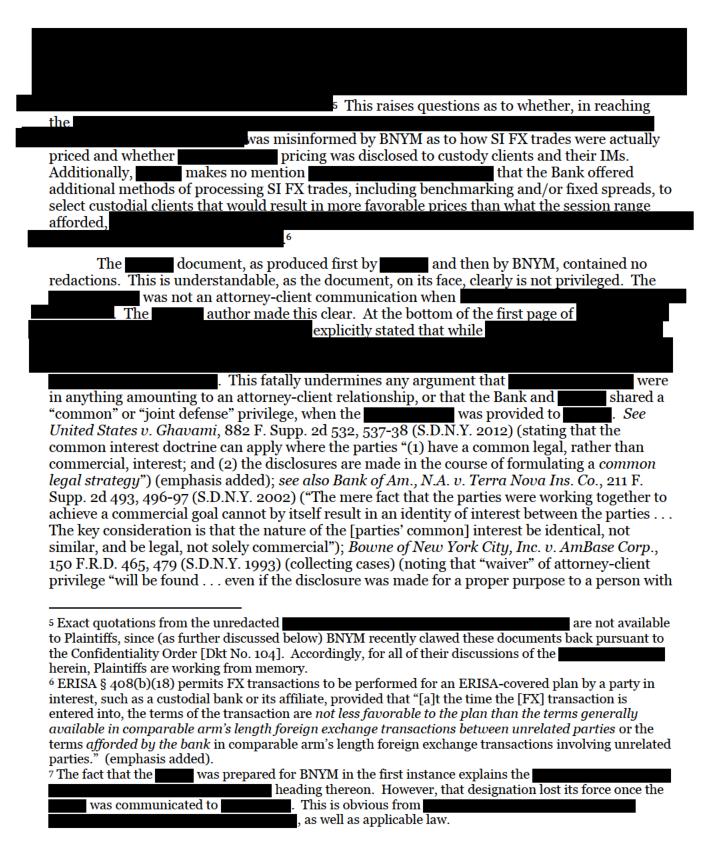
The contained

The \_\_\_\_\_, as initially produced and reviewed by Plaintiffs, contains highly relevant information

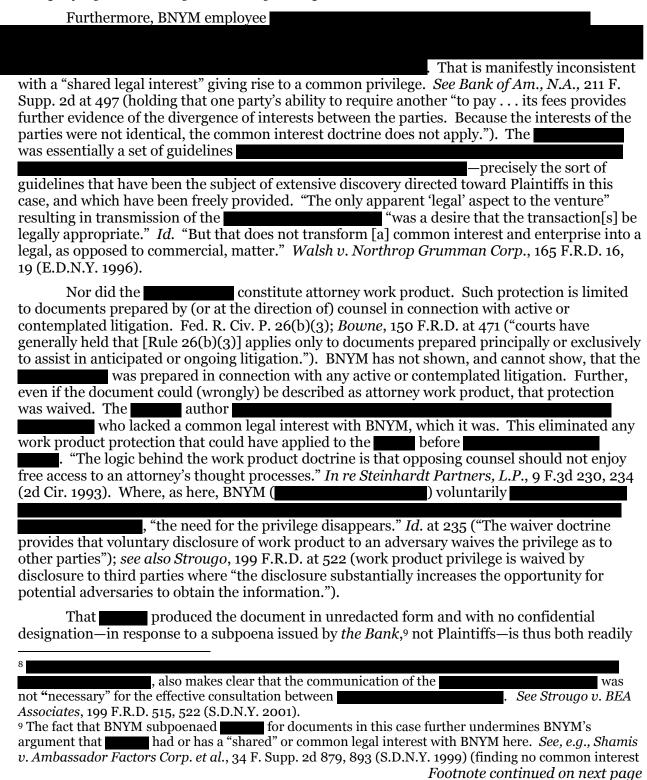
San Francisco New York Nashville www.lieffcabraser.com

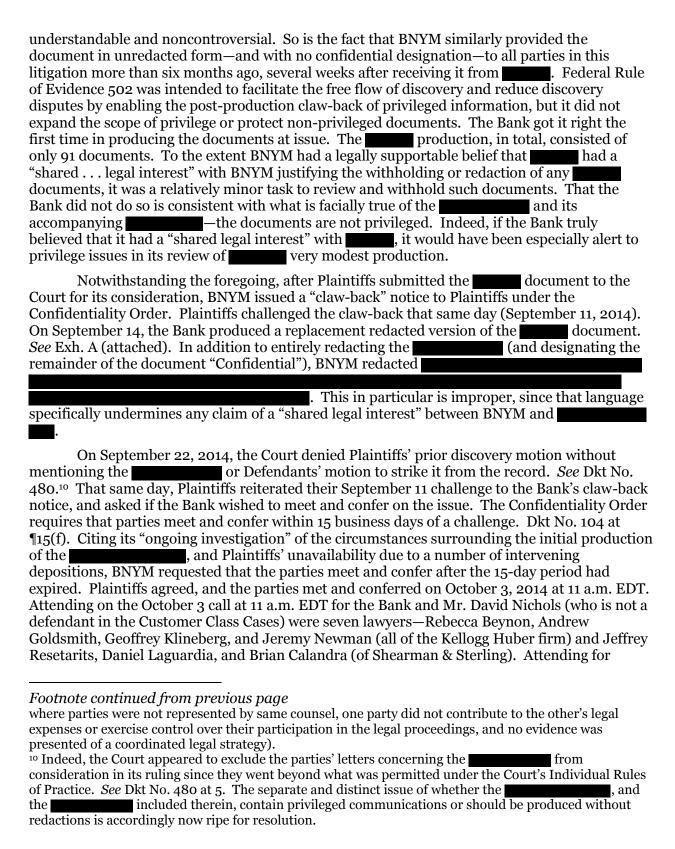
<sup>&</sup>lt;sup>1</sup> "Customer Class Plaintiffs" or "Plaintiffs" refers to plaintiffs in the following putative Customer Class Cases: Southeastern Pennsylvania Transportation Authority v. The Bank of New York Mellon Corp., No. 12-cv-3066-LAK; International Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund v. The Bank of New York Mellon Corp., No. 12-cv-3067-LAK; and Ohio Police & Fire Pension Fund, et al. v. The Bank of New York Mellon Corp., No. 12-cv-3470-LAK.

<sup>&</sup>lt;sup>2</sup> This letter-motion is addressed to Your Honor pursuant to the Court's order of reference of all motions to compel dated December 3, 2013 [Dkt No. 341]. Further, pursuant to Judge Kaplan's recent guidance [Dkt No. 500], Plaintiffs have followed Your Honor's Individual Rules of Practice (the "Individual Rules") on discovery motions rather than the Pilot Project procedures. In accordance with the Individual Rules, this letter-motion is being emailed rather than filed via ECF, since it contains information that has recently been designated Confidential by BNYM pursuant to the Confidentiality Order [Dkt No. 104]. <sup>3</sup> That prior discovery motion was not confined to a motion to compel and asked for guidance on certain instructions being made by BNYM attorneys to BNYM witnesses in their depositions. *See* Dkt No. 452. Accordingly, that motion was addressed to Judge Kaplan.



an interest that is common to him and the privilege holder, unless that common interest is the receipt of legal services by an attorney") (emphasis added).<sup>8</sup>





Plaintiffs were Daniel Chiplock (of Lieff Cabraser Heimann & Bernstein) and Daniel Mulveny (of Kessler Topaz Meltzer & Check).

The meet and confer lasted approximately ten minutes, during which time Plaintiffs reiterated the points made at length in its prior letters to the Court on the Dkt Nos. 462 and 473), and requested any additional case authority for the Bank's contention contained privileged communications. The Bank supplied none other than *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989), for the proposition that the common interest doctrine applied to the communications at issue. Schwimmer is inapposite, as it involved the work papers of an accountant who was hired by one of two criminal defendants to serve the joint interests of the two defendants. In that case, the government accepted, for purposes of the appeal, that the defendants had a valid claim to the common/joint defense privilege. Those circumstances are plainly distinguishable from here, where the Bank has not identified anything but a commercial relationship between BNYM and . As Schwimmer itself provides, the common interest doctrine applies only "where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." Id. BNYM has provided no evidence of any such effort or strategy with respect to Bank declined to provide Plaintiffs with any further substantive response to Plaintiffs' prior letters, even after three weeks of "investigating" the matter, Plaintiffs informed BNYM that the parties were at impasse and that Plaintiffs would be making a motion. "Privileges are neither lightly created nor expansively construed. Instead, they are recognized only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." Bank of Am., N.A., 211 F. Supp. 2d at 496 (internal citations omitted). Under any reasonable standard, the surrounding communications are not privileged.

For all of the foregoing reasons, the contained therein should be produced in unredacted form. Plaintiffs request that the Court undertake an *in camera* review of the in connection with its consideration of this matter. Plaintiffs conferred with BNYM with respect to this last request, and BNYM supplied the following statement: "In the event that the Court wishes to undertake an *in camera* review of this document in connection with its consideration of this matter, BNYM consents to that review."

Respectfully submitted,

Daniel P. Chiplock

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Interim Co-Lead Counsel for the Customer Classes

cc: Sharan Nirmul, Esq.

KESSLER TOPAZ MELTZER & CHECK, LLP

Interim Co-Lead Counsel for the Customer Classes

(via e-mail)

All other Counsel of Record (via e-mail)

1200384.3

## **EXHIBIT A**

(Not Publicly Filed Pursuant to Protective Order)